

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION
2012 DEC -4 P 3: 23

FILED

UNITED STATES OF AMERICA

v.

ELLSWORTH W. COLBERT,

Defendant.

Case No.: 2012-CF1-3958

Trial Date: January 7, 2013

Judge: The Hon. Thomas Motley

Next Court Date: December 14, 2012
Event: Status Hearing

**MOTION TO QUASH OF NON-PARTY DAMON COLBERT
OF THE UNITED STATES OF AMERICA'S SUBPOENA FOR PRODUCTION OF
EVIDENCE TO GOOGLE INC.**

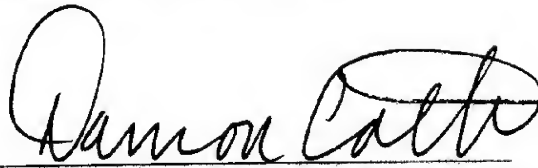
I move to quash the subpoena for production of evidence of the United States of America that purportedly requests that Google Inc. release information pertaining to my personal email address. The Court should issue an order quashing the subpoena because: (1) the documents or other information sought by the United States are protected by the attorney-client privilege; or (2) the documents or other information sought by the United States are not relevant to this case.

In support of this motion, I respectfully refer the Court to the attached memorandum of points and authorities.

WHEREFORE, I request that the Court:

1. grant my motion to quash the subpoena for production of evidence; and
2. grant such other and further relief as it may deem proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Damon Colbert", with a horizontal line extending to the right.

December 4, 2012

DAMON D. COLBERT (D.C. Bar No. 476938)

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Quash Subpoena, Points and Authorities, and proposed Order was mailed and sent by electronic mail to Robert J. Feitel and Edward A. O'Connell, Counsel for the United States of America, this 4th day of December, 2013.

A handwritten signature in black ink, appearing to read "Damon D. Colbert", is written over a horizontal line.

DAMON D. COLBERT (D.C. Bar No. 476938)

Counsel for Defendant

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POINTS AND AUTHORITIES

Introduction

This Court should quash the United States of America's subpoena for production of evidence served on Google Inc. ("Google") because Google's compliance with it would be oppressive. The documents or information to be produced are either attorney-client privileged communications or irrelevant to this case. Under Rule 17(c) of the Superior Court Rules of Criminal Procedure, this Court has the power to quash subpoenas for production of documentary evidence and of objects "if compliance would be unreasonable or oppressive." SCR-Criminal Rule 17(c). Courts generally use the following formulation in considering the standard of "unreasonable or oppressive" that requires a party seeking a subpoena for production of evidence to show:

(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend

unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a “fishing expedition.”

Cooper v. United States, 353 A.2d 696, 701 (D.C. 1976). Here, because the information sought by the United States is either protected by the attorney-client privilege or not relevant to this case, it is not “evidentiary and relevant.” Consequently, the first prong of the formulation is not satisfied.

Factual Background

Defendant Ellsworth W. Colbert (“Mr. Colbert”) is my father and client. In October 2001, I was sworn in as a member of the Virginia State Bar. In April 2002, I was sworn in as a member of the District of Columbia Bar. Since October 2001, Mr. Colbert has sought legal advice from me on myriad matters.

From time to time, I have provided legal advice to Mr. Colbert via email sent from my email address damon.colbert@gmail.com. From time to time, Mr. Colbert called my phone number, (202) 905-2855, to seek legal advice. He also left voice messages regarding legal matters using that phone number. From time to time, I have provided legal advice to Mr. Colbert via phone calls placed to and from my phone number. Both my email address and phone number are provided by Google. My email address is provided under Google’s Gmail service, and my phone number is provided under Google’s Google Voice service. My phone number is linked by Google to my email address. Google stores email sent to and from my email address on its servers. It also records the contents of voice messages sent to my phone number as well as SMS (text) messages sent to and from my phone number. Access to my email and phone records is password-protected. I have never disclosed any password relating to my email or phone number to any individual or entity, except for Google.

On March 4, 2012, Mr. Colbert called my phone number multiple times to seek legal advice. Since March 4, I have provided legal advice to Mr. Colbert regarding this case. I have rendered legal advice to him in person during unmonitored legal visits at the D.C. Jail.

In April 2012, I complied with a subpoena requiring me to testify before the grand jury investigating, among other things, the events of March 4, 2012. During the course of my grand jury testimony, I asserted the attorney-client privilege in response to questions posed by Robert J. Feitel, counsel for the United States, regarding my communications with Mr. Colbert on and before March 4, 2012. To my knowledge, the United States neither contested my assertion of the attorney-client privilege nor sought to compel my disclosure of the content of communications by seeking judicial review.

At approximately 4:48 p.m. Washington, D.C., time on November 9, 2012, I entered my appearance as counsel to Mr. Colbert in this case.

At 3:50 p.m. Washington, D.C., time on November 30, 2012, I received an email at damon.colbert@gmail.com from Google stating that it has received legal process from the United States Attorney's Office for the District of Columbia for information related to my email account. Google will not disclose any additional information about the subpoena, and I have not seen a copy of the subpoena.

Standing to Challenge the Subpoena

Although the subpoena was served on Google, I have standing to move to quash the subpoena. Courts in other jurisdictions have reasoned that a party does not have standing to challenge a subpoena served on a third party unless a party seeks to quash based on claims of privilege, personal interest, or proprietary interest relating to documents being sought. *See, e.g., Johnson v. Gmeidender*, 191 F.R.D. 638 (D. Kan. 2000); *Windsor v. Martindale*, 175 F.R.D. 665 (D.C. Colo. 1997). This Court should adopt this reasoning. As Mr. Colbert's lawyer, I assert the attorney-client privilege on his behalf regarding the information sought by the United States from Google to the extent that the information is comprised of communications regarding legal matters. In addition, I have a personal interest in the information sought by the United States because the information would be derived from my personal, confidential, password-protected account.

The Documents Sought by the United States are not Evidentiary and Relevant

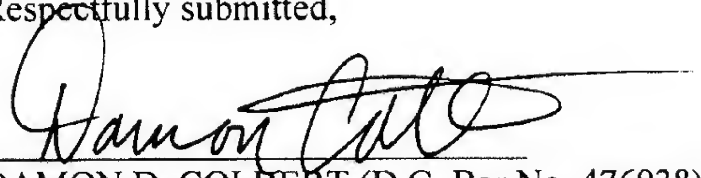
Quashing the United States' subpoena is appropriate because compliance would be oppressive. As noted above, the District of Columbia Court of Appeals in *Cooper* concluded that the Rule 17(c) standard of "unreasonable or oppressive" requires a party seeking a subpoena for production of evidence to show that the documents are evidentiary and relevant. The documents or other information sought by the United States are either protected by the attorney-client privilege or not relevant to this case. Documents or other information shielded by the attorney-client privilege cannot be evidentiary because they are inadmissible at trial.

If the information sought by the United States is not protected by the attorney-client privilege, then it is irrelevant to this case. Before March 4, 2012, I did not use the email account damon.colbert@gmail.com or the Google Voice phone number (202) 905-2855 to communicate with Mr. Colbert about this case, the decedent in this case, or any eyewitness to the events on March 4, 2012, that resulted in the United States' prosecution of Mr. Colbert.

Conclusion

Because the documents sought by the United States are not evidentiary and relevant, this Court should grant my motion to quash the subpoena for production of evidence.

Respectfully submitted,



December 4, 2012

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UNITED STATES OF AMERICA

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Upon consideration of non-party Damon D. Colbert's motion to quash the subpoena for production of evidence, points and authorities attached thereto, the opposition thereto, and the entire record of this matter, it is hereby ORDERED that non-party Damon D. Colbert's motion is granted.

SO ORDERED.

Date _____

The Hon. Thomas J. Motley

Copies of Order to:

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